NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAI HUU NGUYEN, Petitioner, v. MICHAEL B. MUKASEY, Attorney General, Respondent.	No. 04-75315 Agency No. A72-642-513 MEMORANDUM [*]

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted December 3, 2007[**]
Pasadena, California

Before: PREGERSON, NOONAN, and TROTT, Circuit Judges.

Hai Huu Nguyen ("Nguyen"), a Vietnamese citizen, challenges the Immigration Judge's ("IJ") holding, and the Board of Immigration Appeals'

[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

[**] The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

("BIA") summary affirmation, that he is inadmissible for falsely claiming United States Citizenship in violation of 8 U.S.C. § 1181(a)(6)(C)(ii) and is ineligible for asylum and withholding of removal. Because of a change in law during the pendency of this appeal, we vacate the decisions below.

Nguyen arrived in the United States with his parents and siblings in 1992 as a public interest parolee. In May 2000, Nguyen left the United States with several friends for a one-night drinking binge in Tijuana, Mexico. His troubles began early the next morning when his friends woke him to answer a border guard's questions as to his citizenship. Hung over and possibly still intoxicated, he falsely claimed U.S. citizenship. The border guard doubted him and took him into custody. Nguyen recanted his statement the same day and was admitted on humanitarian parole. The government later charged him with being inadmissible and subject to removal for falsely representing himself as a U.S. citizen under 8 U.S.C. § 1182(a)(6)(C)(ii) and not being in possession of a valid unexpired visa under 8 U.S.C. § 1182(a)(7)(A)(i)(I).

Before the IJ, Nguyen first applied for adjustment of status to become a legally permanent resident. His mother already had become a naturalized citizen. The attorneys for both Nguyen and the government agreed that if Nguyen conceded to not being in possession of a valid unexpired visa, the government

would drop the charge that he had falsely represented himself as a U.S. citizen. The alleged misrepresentation would thus not present a barrier to his application for adjustment of status.

The IJ later found that he could not adjudicate Nguyen's application because Nguyen was an arriving alien in removal proceedings. *See* 8 C.F.R. § 245.1(c)(8) (2002). For reasons not explained in the record, the government then reneged on its initial agreement and sought to remove him on both charges. Nguyen applied for asylum and withholding of deportation, but the IJ found him ineligible for both forms of relief.

In 2005, this court invalidated 8 C.F.R. § 245.1(c)(8) (2002), finding that it conflicts with 8 U.S.C. § 1255(a), which allows any alien who has been "inspected and admitted or paroled" into the country to apply for adjustment of status. *Bona v. Gonzales*, 425 F.3d. 663, 668 (9th Cir. 2005). Seeking to avoid litigation on the regulation, the Departments of Homeland Security and Justice removed and replaced the regulation last year. *See* Eligibility of Arriving Aliens in Removal Proceedings to Apply for Adjustment of Status and Jurisdiction to Adjudicate Applications for Adjustment of Status, 71 Fed. Reg. 27,585 (May 12, 2006).

Under *Bona*, the fact that Nguyen was in removal proceedings should not have barred him from applying for adjustment of status. We find that the IJ erred

by not adjudicating Nguyen's application for adjustment of status. Had the IJ adjudicated it, he would not necessarily have reached a decision as to whether Nguyen violated 8 U.S.C. § 1181(a)(6)(C)(ii) or whether Nguyen was eligible for asylum or withholding of deportation. We vacate the decisions below and remand as to Nguyen's application for adjustment of status.

The petition is GRANTED and the case is REMANDED.